# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 174.

JOHN A. WATSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED JUNE 11, 1906.

(21,224.)

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INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1909.

1 STATE OF MARYLAND, *ss:*

In the Court of Appeals of Maryland.

JOHN A. WATSON, Appellant,
vs.
THE STATE OF MARYLAND, Appellee.

I, Caleb C. Magruder, Clerk of the Court of Appeals of Maryland, do hereby forward to the Supreme Court of the United States in pursuance to the subjoined writ of error, the following papers, to-wit:—

Original Petition for Writ of Error and the Order of Court thereon.
Copy of Assignment of Errors.
Original Writ of Error.
Original Citation.
Copy of Bond for Costs.
Copy of Record on Appeal filed in this Office from the Circuit Court for Allegany County, Maryland.
Copy of Original Opinion of the Court of Appeals of Maryland.
Copy of Docket entries in Court of Appeals of Maryland.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the said Court of Appeals, this 20th day of May, A. D., 1908.

[Seal Court of Appeals, Maryland.]

C. C. MAGRUDER,
*Clerk of the Court of Appeals of Maryland.*

2 The Court of Appeals of the State of Maryland.

JOHN A. WATSON
vs.
THE STATE OF MARYLAND.

The petition of John A. Watson respectfully shows:

That heretofore to wit upon the 11th day of January 1907, the said John A. Watson was indicted for practicing medicine without having registered as a physician or surgeon, by the Grand Jurors for the body of Allegany County in the State of Maryland. That on the 4th day of February, 1907, In the Circuit Court for Allegany County, in the State of Maryland, the said John A. Watson was tried on said indictment and was found guilty on 1st Count in the indictment. That on February 5th, 1907, an order was filed for an appeal from the Circuit Court for Allegany County to the Court of Appeals of the State of Maryland, that being the highest Court of the State of Maryland. And on the 24th day of April, 1907, the said Court of Appeals affirmed the judgment of the Circuit Court, which was a final judgment.

Upon the trial of said cause the said John A. Watson, demurred to the indictment for several reasons some of which reasons were to the insufficiency of the indictment, while other reasons drew into question the validity of the statutes of the State of Maryland in reference to the practice of medicine, on the ground of their being repugnant to the Constitution of the United States and that the decision was in favor of the Constitutionality of said Statute by the Count of Appeals of the State of Maryland, which decision was a final judgment of the highest Court in the said State of Maryland.

And your petitioner alleges and contends by said demurrer in said case that the said Statutes of the said State of Maryland in reference to the Practice of Medicine are in conflict with the Constitution of the United States.

3 And your petitioner has further shown that the said judgment of the said Court of Appeals was and is a final judgment in the highest Court of the State of Maryland in which a decision in said suit could or can be had.

And your petitioner further shows that a Federal question was made in said case, to wit, as hereinbefore set out, and that said judgment of said Court of Appeals was repugnant to and in conflict with the Constitution of the United States and that a decision of said Federal question was necessary to the judgment rendered.

Wherefore your petitioner presents herewith an exemplified transcript of the record of the Court of Appeals of Maryland, in said case marked "Record," and also an assignment of error marked "Assignment of Error," and prays that a writ of error to the Supreme Court of the United States be allowed; that citation be granted and signed, that the bond herewith presented be approved, that the errors complained of may be reversed in the Supreme Court of the United States and the judgment aforesaid of said Court of Appeals of Maryland be reversed.

JOHN A. WATSON,
By His Attorneys at Law, FERDINAND WILLIAMS,
CHAS. G. WATSON,
*Attorneys and Counsel for Petitioners.*

The writ of error as prayed for in the aforesaid petition is hereby allowed this 28th day of April, A. D. 1908. And the bond
4 for cost in the Supreme Court of the United States is fixed at the sum of two hundred and fifty dollars.

Dated at Annapolis this 28th day of April, A. D. 1908.

A. HUNTER BOYD,
*Chief Judge of the Court of Appeals of the State of Maryland.*

Filed in my office this 28th day of April, A. D. 1908.

C. C. MAGRUDER,
*Clerk of the Court of Appeals of the State of Maryland.*

5 [Endorsed:] John A. Watson vs. State of Maryland. Petition and Order for *for* Writ of Error. Filed April 28th, 1908. Chas. G. Watson, Attorney-at-Law.

6 The Court of Appeals of the State of Maryland.

JOHN A. WATSON, Plaintiff in Error,
vs.
STATE OF MARYLAND.

*Assignment of Errors.*

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decisions, and final judgment of the Court of Appeals of the State of Maryland, in the above entitled matter there is manifest error in this, to wit:

First. The Court erred in holding that the provisions of Chapter 612 Sec-. 43 and 61, of the Acts of 1902, of the General Assembly of Maryland, titled "Health" subtitled "Practitioners of Medicine," are not in conflict with and in violation of the provisions of the 14th amendment of the Constitution of the United States, for that the State of Maryland, by and through the provisions of said Chapter 612 assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States and of the State of Maryland of the same right to practice medicine with other citizens of the State similarly situated. (2) To deprive the plaintiff in error and other citizens of the United States of the liberty to pursue a lawful profession under the same conditions and regulations that are required of other citizens and persons within the jurisdiction of the State of Maryland, the equal protection of the law.

Second. The Court erred in holding that by the provisions of said Act the plaintiff in error is not deprived of rights, privileges
7 and immunities secured to other citizens of the United States and of the State of Maryland by the Federal Constitution and laws of the United States.

Third. The Court erred in holding that the provisions of said act do not deny to the Plaintiff in error the equal protection of the law.

Fourth. The Court erred in holding that said act does not grant special and exclusive privileges to certain citizens which it denies to the Plaintiff in error and to other citizens of the State.

Fifth. The Court erred in holding that the provisions of said act are uniform in their operation throughout the State upon all citizens of the State similarly situated.

FERDINAND WILLIAMS,
CHAS. G. WATSON,
*Attorneys for Plaintiff in Error.*

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the State of Maryland before you, or some of you, between John A.

Watson, plaintiff in error and the State of Maryland, defendant in error a manifest error hath happened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of June, in the year of our Lord one thousand nine hundred and eight.

[The Seal of the Circuit Court, Maryland.]

ARTHUR L. SPAMER,
*Clerk of the Circuit Court of the United States*
*for the District of Maryland.*

Allowed by
A. HUNTER BOYD,
*Chief Judge of Court of Appeals of Maryland.*

[Endorsed:] Writ of Error issued by Clerk Ct. Ct. U. S., Dist. of Md.

9 UNITED STATES OF AMERICA, *ss:*

To the State of Maryland, Office of the Attorney General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days (30) from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the State of Maryland, wherein John A. Watson, is plaintiff in error and you are Defendant in error, to show cause if any there be why the judgment rendered against the said Plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in his behalf.

Witness the Honorable A. Hunter Boyd, Chief Judge of the Court of Appeals of the State of Maryland, this 28th day of April, in the year of our Lord 1908.

A. HUNTER BOYD,
*Chief Judge of the Court of Appeals*
*of the State of Maryland.*

Copy of the within citation received this 5th day of May A. D. 1908, at the Office of the Attorney General of the State of Maryland.

ISAAC LOBE STRAUS.
*Attorney General of Maryland.*

10 [Endorsed:] 3. John A. Watson vs. State of Maryland. Citation. Filed April 28th, 1908. Chas. G. Watson, Attorney-at-Law.

11 STATE OF MARYLAND:

The Court of Appeals of the State of Maryland.

JOHN A. WATSON
vs.
STATE OF MARYLAND.

*Bond.*

Know all men by these presents, That we, John A. Watson, as principal, and John D. Watson and Michael Crawford, as sureties, are held and firmly bound unto the State of Maryland, in the full and just sum of two hundred and fifty dollars, to be paid to the said State of Maryland or its certain Attorney, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28 day of March, in the year of our Lord 1908.

Whereas, lately at the Court of Appeals of the State of Maryland, in a suit pending in said Court, between John A. Watson, Appellant, and the said State of Maryland, Appellee, a judgment was rendered against the said John A. Watson, and the said John A. Watson is about to obtain a writ of error and file a copy thereof in the Clerk's Office, of the said Court of Appeals, of the State of Maryland, to reverse the judgment in the aforesaid suit and a citation directed to the said State of Maryland, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington,

12 within 30 days from the date thereof.

Now the condition of the above obligation is such, That if the said John A. Watson, shall prosecute his writ of error to effect, and answer all costs, if he should fail to make his plea good then the above obligation to be void; else to remain in full force and virtue.

JOHN A. WATSON. [SEAL.]
JOHN D. WATSON. [SEAL.]
MICHAEL CRAWFORD. [SEAL.]

Signed, sealed and delivered in the presence of
R. A. NORRIS.
E. M. NORRIS.

Approved by—

A. HUNTER BOYD,
*Chief Judge of the Court of Appeals of the State of Maryland.*

13 STATE OF MARYLAND,
*Allegany County, To wit:*

In the Circuit Court for Allegany County, Md.

No. 20, Criminal Trials, Jan'y Term, 1907.

STATE OF MARYLAND
vs.
JOHN A. WATSON.

Appeal from the Circuit Court for Allegany County.

Presentment Found Jan'y 11th, 1907.

Indictment sworn to and filed Jan'y 11th, 1907, in the words following, to wit:

STATE OF MARYLAND,
*Allegany County, To wit:*

The Jurors of the State of Maryland, for the body of Allegany County do on their oath present, that John A. Watson, late of Allegany County aforesaid, on the sixth day of November in the year of our Lord nineteen hundred and six at Allegany County aforesaid, unlawfully did practice medicine and surgery in the said State, without being then and there duly registered, as a Physician or Surgeon in the registry of Physicians and Surgeons in accordance with the provisions of the act of Assembly in such case made and provided; contrary to the form of the act of assembly in such case made and provided, and against the peace government and dignity of the State—

Second Count.

And the Jurors aforesaid, upon their oaths aforesaid, do further present, that John A. Watson late of said County on the said sixth day of November in the year of our Lord nineteen hundred and *and* five, at Allegany County aforesaid, unlawfully did practice medicine by then and there administering medical treatment to a person whose name is to the Jurors unknown, without being then and there registered as a Physician; contrary to the form of the act of assembly in such case made and provided, and against the peace government and dignity of the State—

14 Third Count.

And the Jurors aforesaid, upon their oath aforesaid, do further present, that the said John A. Watson on the said sixth day of November, in the year of our Lord nineteen hundred and six, at Allegany County aforesaid, unlawfully did practice medicine by then and there administering medical treatment to one Michael McDonald without being then and there registered as a Physician; contrary to the form

of the act of assembly in such case made and provided, and against the peace government and dignity of the State—

AUSTIN A. WILSON,
*The State's Attorney for Allegany County.*

Endorsed as follows, to-wit:
"*True Bill,*

WALTER POWELL, *Foreman.*"

"Witness Michael McDonald, sworn to the Grand Jury upon this Indictment this 11th day of January, 1907—
Test: J. W. YOUNG, *Clerk.*"

Warrant issued for the traverser—mentioned in the Indictment—The Sheriff of Allegany County returns

"*Cepi Bond.*"

1907, Jan'y 14th.—Demurrer to Indictment—
1907, Jan'y 28th.—Demurrer overruled—
1907, Jan'y 28th.—Defendant's plea filed—Demurrer to plea—Motion and leave to amend plea—Same amended and filed. Demurrer to amended plea—Demurrer overruled—
1907, Jan'y 29th.—Motion and leave to renew demurrer to plea—Demurrer to amended plea—
1907, Jan'y 30th.—Demurrer to amended plea sustained—

*Defendant's First Plea as Amended.*

Filed Jan'y 28th, 1907.

The said John A. Watson says, that at a session of the Circuit Court for Allegany County, held in Cumberland on the first Monday of January 1906, an indictment was presented against him, which was placed on the trial docket of said term and continued until the April term 1906, and the same was again continued until October term 1906, being No. 1 Criminal Trials on the said October term 1906, and that the said Indictment was in the words following:

STATE OF MARYLAND,
—— *County, — wit:*

The Jurors of the State of Maryland for the body of Alle-
15 gany County do on their oath present that John A. Watson, late of Allegany County aforesaid, on the first day of October in the year of our Lord nineteen hundred and five, at Allegany County aforesaid, unlawfully did practice medicine and surgery in the said State without being then and there duly registered as a physician or surgeon in the registry of Physicians and Surgeons in accordance with the provisions of the act of Assembly in such case made and provided; contrary to the form of the Act of Assembly in such

case made and provided, and against the peace, government and dignity of the State—

Second Count.

And the Jurors aforesaid, upon their oath aforesaid, di further present that the said John A. Watson, on the said first day of October, at Allegany County aforesaid, unlawfully did practice medicine by then and there administering medical treatment to John P. Moody and to a person whose name is to the Jurors unknown, without being then and there registered as a Physician; contrary to the form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State—

Third Count.

And the Jurors aforesaid, upon their oath aforesaid, do further present that the said John A. Watson on the said first day of October in the year of our Lord nineteen hundred and five, at Allegany County aforesaid, unlawfully did practice medicine by then and there administering medical treatment to one Marie Martin, without being then and there registered as a physician; contrary to the form of the act of assembly in such case made and provided, and against the peace government and dignity of the State—

AUSTIN A. WILSON,
*The State's Attorney for Allegany County.*

That he pleaded not guilty to said indictment and was thereupon by the verdict of a jury duly impaneled and sworn to try said indictment, found not guilty of the matter whereof he stood thus indicted, whereupon he was by said Court duly discharged.

That he and the said John A. Watson, defendant in the above recited indictment are one and the same person; and the offence therein set out and that now charged are one and the same offence. And that at said trial the only question was whether the defendant could lawfully practice medicine in Allegany County without being registered as a physician or Surgeon in the Registry of Physicians and Surgeons under Art. 43 of the Code—Sub-title Practiotioners of Medicine—

CHAS. G. WATSON,
*Attorneys for Defendant.*

1907, Jan'y 30th.—Motion and leave to file additional pleas—
1907, Jan'y 31st.—Defendant's second plea filed—

16 *Defendant's Second Plea.*

Filed Jan'y 31st, 1907.

*For Plea:*

The said John A. Watson says, that at a session of the Circuit Court for Allegany County, held in Cumberland on the first Monday of January 1906, an indictment was presented against him, which was

placed on the trial Docket of said term and continued until the April term 1906—And the same was again continued until the October term 1906, being No. 1 Criminal Trials, on the said October term 1906, and that the said Indictment was in words following:

STATE OF MARYLAND,
—— *County, — wit:*

The Jurors of the State of Maryland for the body of Allegany County, do on their oath present that John A. Watson late of Allegany County aforesaid, on the first day of October in the year of our Lord nineteen hundred and five at Allegany County aforesaid, unlawfully did practice medicine and surgery in the said State without being then and there duly registered as a Physician or Surgeon in the registry of Physicians and Surgeons in accordance with the provisions of the Act of Assembly in such cases made and provided, and contrary to the act of Assembly in such case made and provided and against the peace, government and dignity of the State.

Second Count.

And the Jurors aforesaid upon their oath aforesaid do further present that the said John A. Watson on the said first day of October at Allegany County aforesaid unlawfully did practice medicine by then and there administering medi*cine* treatment to John P. Moody and to a person whose name is to the Jurors unknown without being then and there registered as a physician contrary to the form of the act of Assembly in such cases made and provided and against the Peace, Government and dignity of the State—

Third Count.

And the Jurors aforesaid upon their oath aforesaid do further present that the said John A. Watson on the said first day of October in the year of our Lord nineteen hundred and five, at Allegany County aforesaid unlawfully did practice medicine by then and there administering medical treatment to one Marie Martin without being then and there registered as a Physician contrary to the form of the act of Assembly in such case made and provided and against the peace, Government and dignity of the State—

AUSTIN A. WILSON,
*The State's Attorney for Allegany County.*

That he pleaded not guilty to said indictment and was thereupon by the verdict of a jury duly impaneled and sworn to try said indictment, found not guilty of the matter whereof he stood thus indicted, whereupon he was by said Court duly discharged—

17 That he the said John A. Watson, defendant in the above recited indictment are one and the same person; and the offense therein set out and that now charged are one and the same offence. Defendant says that at said trial it was proved without denial that he the said defendant practised medicine in Allegany County at the time alleged in said indictment and that at said trial

the only question at issue was whether defendant was entitled and qualified (Under Art. 43 of the Code, sub-titled Practice of Medicine) to practice medicine in Allegany County and that by the verdict and judgment in said case it was adjudged that defendant was so entitled and qualified and defendant says that the qualification to practice medicine in said County under said law is now, and was, since said trial has been identical- the same — it was at the time of said indictment and trial and at the time of the alleged unlawful acts set forth in said indictment—

FERDINAND WILLIAMS,
CHAS. G. WATSON,
*Att'ys for Defendant.*

1907, Feb. 4th.—Demurrer to second plea—Demurrer sustained—Issue joined—Jury sworn—Trial—Verdict, Guilty on first count—

1907, Feb. 4th.—The Traverser sentenced by the Court to pay a fine of two hundred dollars ($200.00) and costs—

1907, Feb'y 5th.—Appeal prayed and affidavit of Traverser's counsel that Appeal has not been taken for delay—

*Copy of Docket Entries.*

1907, Jan'y 11th.—Practicing Medicine without Registration—Presentment—Indictment—Warrant issued—*Cepi* bond—

1907, Jan'y 14th.—Demurrer to Indictment—Jan'y 28th Demurrer over-ruled—

1907, Jan'y 28th.—Defendant's first plea filed—Demurrer to plea—motion and leave to amend pleas—same amended and filed—Demurrer to amended plea—Demurrer over-ruled—

1907, Jan'y 29th.—Motion and leave to renew Demurrer to plea—Demurrer to amended plea—Jan'y 30th Demurrer to amended plea sustained—

1907, Jan'y 30th.—Motion and leave to file additional pleas—Jan'y 31st Defendant's second plea filed—1907 Feb'y 4th Demurrer to second plea—Demurrer sustained—Plea not guilty—Issue joined—Jury sworn—Trial—Verdict—Guilty on the first count—

1907, Feb. 4th.—The traverser sentenced by the Court to pay a fine of $200.00 and costs—

1907, Feb. 5th.—Order for appeal and affidavit—

1907, Feb'y 27th.—Record this day transmitted to the Clerk of the Court of Appeals.

18 STATE OF MARYLAND,
*Allegany County, To wit:*

I hereby certify that the above and aforegoing is truly taken from the Record and proceedings of the Circuit Court for Allegany County, in the above entitled case—

In testimony whereof I hereto subscribe my name and affix the

seal of said Circuit Court, at Cumberland, this 27th day of February A. D. 1907.

[Seal's Place.]

J. W. YOUNG,
*Clerk of the Circuit Court for Allegany County.*

AUSTIN A. WILSON,
*The State's Attorney.*
FERDINAND WILLIAMS,
CHAS. G. WATSON,
*Traverser's Attorney.*

State's Costs..... $31.40
Making up Record..... $ 4.00

True Copy:
Test:

J. W. YOUNG, *Clerk.*

19 Court of Appeals of Maryland, April Term, 1907.

JOHN A. WATSON
vs.
THE STATE OF MARYLAND.

Judge Pearce Delivered the Opinion of the Court.

The appellant was indicted in the Circuit Court of Allegany County under Section 99 of Article 43 of the Code of 1904 for practising medicine and surgery in this State without being registered as a practitioner of medicine as required by Sections 83 and 89 of that Article.

There are three counts in the indictment. The first count charges that the defendant, on November 6th 1906, "unlawfully practised medicine and surgery in Allegany County, without being then and there duly registered as a physician or surgeon in the Registry of Physicians and Surgeons."

The second count charges the commission of the offence on November 6th 1906 "by then and there administering medical treatment to a person whose name is to the jurors unknown, without being then and there registered as a physician."

The third count charges the commission of the offence on November 6th 1906 "by then and there administering medical treatment to one Michael McDonald, without being then and there registered as a physician."

The defendant demurred to the indictment and the demurrer was overruled. It was contended that the indictment was insufficient for the following reason. Section 80 of Article 43 provides that the Board of Medical Examiners at its meeting on June 1st in each year shall apoint a Secretary-Treasurer whose duty it shall be within sixty

days thereafter, upon receiving from the Clerk of the Circuit Court of Baltimore City, and the Clerk of the Circuit Court for each
20 County in the State a list of all who have been legally registered in such Court, to send to all physicians then practising in the State without having been legally registered, a printed notice of the provisions of that Article relating to the duty of the Police Commissioners in Baltimore City and the Sheriffs of the several Counties, which requires them to see that all practising physicians in the State shall be legally registered, and to report to the State's Attorney of the City or County all cases of violation of that subtitle of Article 43.

The appellants contention is that to make this indictment good under this law it should state that this notice had been sent to the accused.

If this requirement as to the sending of notice were incorporated in the clause which enacts the offence this might be a matter for consideration, but no offence is created by Section 80. It is only by Section 99 that practising medicine or surgery without being registered, is made a misdemeanor and punishable as such. Even if this requirement could be treated as an exception is treated, it would not be necessary to aver the sending of the notice because it is not so incorporated in the enacting clause of the Statute that the one cannot be read without the other, and it is only in such cases that the indictment must negative an exception. Stearns vs. State, 81 Md. 344. Keifer vs. State, 87 Md. 568. State vs. Knowles, 90 Md. 658. Where the exception is contained in a subsequent or separate clause or section, it is a matter of defence to be pleaded by the accused. And even if pleaded in this cause, it could not avail, because it is clear from all the provisions of Article 43 that the receipt of such notice is not necessary to constitute the offense of practising medicine without being registered. The offence is created solely by section 99 in broad and general language without exception, qualification, or condition of any sort.

It was also contended that the provisions of section 83 of Article 43 are unconstitutional in that they make an unreasonable and arbitrary class distinction or discrimination. That section requires that
21 "all persons, (except physicians who were practising medicine in this State prior to the first day of January 1898, who are now practising medicine or surgery, and can prove by affidavit that within one year of said date said physician had treated in his professional capacity, at least twelve persons) who shall commence the practise of medicine or surgery in any of their branches after the eleventh day of April 1902 shall make a written application for license to the President of either Board of Medical Examiners which said applicant may elect, accompanied by satisfactory proof that the applicant is more than twenty one years of age, is of good moral character, has obtained a competent common school education, and has either received a diploma conferring the degree of doctor of medicine from some legally incorporated medical college in the United States, or a diploma, or license, conferring the full right to practice all the branches of medicine and surgery in some foreign country; said diploma, if

from a college in the United States, must have been conferred by a legally incorporated college requiring a four years' standard of education as defined by the American Medical College Association, or the Inter-collegiate Committee of the American Institute of Homeopathy respectively."

That section of the Code was section 43 of chapter 612 of 1902, which chapter repealed and re-enacted with amendments certain sections of Article 43 — the Code including sec. 43 as enacted by chapter 296 of 1892, which latter act in turn repealed and reenacted with amendments almost all the sections of Article 43 of the Code of 1888—including section 43 under the subtitle "Practitioners of Medicine," as enacted by Chapter 429 of 1888, codified in the Code of 1888. Under the Act of 1888, physicians who had been continuously practising medicine within this State for ten years previous to the passage of that Act were not required to obtain a certificate of qualification from the State Board of Health, as all other practitioners of medicine were thereby required to do. The Act of 1892, as was observed in Manger vs. Board of Examiners, 90 Md. 637, swept away the whole scheme devised by the Act of 1888, and was specifically made applicable to persons *not then* practicing medicine, but who should thereafter *begin to practice.*" Under that Act, and down to the passage of the Act of 1902, all persons practising medicine and surgery at the date of the passage of the Act of 1892 were free to continue to practice without license or other evidence of qualification. Here was a discrimination both broad and emphatic, the evident design of which was to afford protection to the public without interference with established and recognized practitioners. It may be reasonably inferred that after ten years experience under that Act, the Legislature deemed that system too liberal since the Act of 1902, as incorporated in the Code of 1904, provides that "all persons *now* practising medicine and surgery, or who shall hereafter begin to practice medicine or surgery in any of their departments, except den-istry, in the State of Maryland, shall possess the qualifications required by this subtitle."

22

We have already transcribed herein, the provision of sec. 83, under which physicians who were practising in this State prior to January 1st 1898, and who were practising at the passage of that Act, and could prove by affidavit that within one year from that date that they had treated in a professional capacity at least t-elve persons should be exempt from the requirement to obtain a license, and it is this exemption which is assailed as an unreasonable and arbitrary discrimination or classification forbidden by the fourteenth amendment to the Constitution of the United States. In State vs. Broadbelt, 89 Md. 579, this Court said, quoting Judge Cooley, "The guaranty of equal protection is not to be understood, however, as requiring that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal, if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and

liabilities imposed. The classification must be based on reasonable grounds. It cannot be a mere arbitrary selection."

23 It must be conceded upon all the authorities, and it is conceded by the appellant, that if the classification is reasonable and bears any proper relation to the object sought to be accomplished, that object being in itself a lawful and proper purpose, it is not forbidden by the Fourteenth Amendment. It is conceded that the States may in the exercise of the police powers, pass laws for the pro-ction of the health and safety of the public, and this law was passed under that power. Now the object sought to be accomplished by this law is to protect the public against incompetent and ignorant practitioners of medicine, while at the same time protecting actual practitioners of medicine against arbitrary and unreasonable exclusion from the practice of their profession. The law deals with that class of the people who have adopted and are engaged in the practice of the profession of medicine, and who are dependent upon it for the support of themselves and their families, and with that other and larger class to whom competent medical practitioners are essential for the preservation of their health. These two classes are recognized classes, and each is entitled to consideration in framing the law. In Dent vs. West Virginia, 129 U. S. 121, the Supreme Court of the United States, speaking of the right of every citizen to follow any lawful business or profession he may choose, subject only to such lawful restrictions as may be imposed upon such right, said, "The interest, or, as it is sometimes termed, the estate acquired in their vocations, that is the right to continue their prosecution, is often of great value to the possessor, and can not be arbitrarily taken from them any more than their real and personal property can be thus taken." It was the recognition of this principle which led to the provision, here assailed. Continuous acceptable practice in the community in which one lives is *one* of the legitimate tests or evidences of qualification; not of *uniform* qualification of the *highest attainable standard*, such as can only be ascertained by a thorough examination by competent examiners but of such *reasonable* qualification as may justify the continuance, without examination of practice approved by the limited community in which the practitioner

24 had his field. Without such an exemption from the rigid examination which conforms to the high standard of the principal medical colleges of this day, many worthy men established in character and reputation, might be prohibited from practice, and this would be especially true among the poorer classes of people who cannot afford to employ physicians of the highest grade, but whose self respect and independence will not permit them to seek the charity so generously bestowed upon the poor by the medical profession.

In Magoun vs. Illinois Trust Co. 170 U. S. 294, the Supreme Court speaking of the Fourteenth Amendment which prohibits the denial to any citizen of the equal protection of the laws, said, "This rule prescribes no rigid equality, and permits to the wisdom and discretion of the Legislature a wide latitude so far as the interference of this Court is concerned, * * * equality of operation does not mean indiscriminate operation on persons merely as such, but on

persons according to their relations. * * * Hardships, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity."

In Dent vs. West Virginia, the law which was upheld, exempted from examination and license all physicians who had practised medicine in that State continuously for ten years. The period of practice required under section 83 of Art. 43 at the time of its passage was a little more than four years, and that law has now been in force five years. If it was within the discretion of the Legislature to fix a ten year period, it was equally within their discretion to fix a four year period, since the Supreme Court has said the Legislature has a wide latitude in dealing with such classifications. To justify the striking down of such a classification it must as was said in Luman vs. Hitchens Bros. Co. 90 Md. 27, be "obviously arbitrary," and must be shown "not to rest upon some difference which, bears a reasonable and just relation to the act—the thing—in respect to which the classification is proposed." This has not been shown in the argument or in the brief of the appellant. On the contrary, reexamination of the authorities and a careful reading of the
25 briefs, convinces us that the law is not open to this objection.

In Scholle vs. State, 90 Md. 740, where the Act of 1892 was drawn in question as it related to the right of practising medicine in this State without registration, the Court said, "where there are differences as to conditions and situations, by which it becomes reasonable that greater precautions are required in some cases than in others, classes may be formed by which certificates can be granted to some without examination, and by which others may be exempted altogether from the burden of registration. These classes must be created upon considerations only that are promotive of the public interests, and if they are so created, they do not constitute an unlawful discrimination and do not impair the equal right which all can claim in the enforcement of the laws."

This law was attacked under the demurrer to the indictment upon the further ground that sec. 101 provides that nothing contained in said subtitle should be construed to apply to the following persons: 1st. Those rendering gratuitous services; 2nd. Resident or assistant resident physicians or students at hospitals in the discharge of their hospital or dispensary duties, or in the office of physicians; 3rd. Physicians or surgeons from another State or Territory, when in actual consultation with a legal practitioner in this State; 4th. To commissioned surgeons of the United States Army or Navy, or Marine Hospital service; 5th. To chiropodists; 6th. To midwives; 7th. To masseurs or other manual manipulators who use no other means; 8th. To physicians or surgeons residing on the borders of a neighboring State, and duly authorized to practice under its laws, and whose practice extends into the limits of the State, but not so as to permit them to maintain an office in this State.

The 3rd & 4th of the above classes were considered in Scholle vs. State, supra, and the classification was sustained as just and reasonable, upon grounds so obviously sound that we shall content ourselves with referring to them without repeating them. It was also

held in that case that "persons temporarily practicing under the supervision of an actual medical preceptor", who were by the
26 Act of 1892 exempted from the provisions of that Act, constituted a reasonable and proper class for such exemption. That class is the equivalent of those embraced in class 2 above, and described as students in the discharge of their duties in the office of physicians, which would confine them to the supervision of those physicians in whose offices they were. The reasonableness of the other exceptions made in section 101, when considered in the light of the reasons assigned in Scholle vs. State for the judgment in that case are so obvious that we shall not extend this opinion by considering them in detail. It should be sufficient to say that they all come in our judgment within the wisdom and discretion of the legislature, which the Supreme Court has said Magoun vs. Illinois Trust Co. 170 U. S. supra, has so "wide a latitude", and that this case falls within the language of the Court in the recent case of Dobbins vs. Los Angeles, 195 U. S. 235, in which it was said that "every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety and that it is not the province of the Courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community."

The demurrer to the indictment being overruled the defendant filed two pleas of *Autre fois acquit.* The first plea averred that the defendant was indicted at the January Term 1906 of the Circuit Court for Allegany County for unlawfully practising medicine in Allegany County without being registered as a physician and then proceeded to set out the indictment in full which contained three counts. The first count charged the offence in the exact language of the first count of the present indictment except that the date of the offence was charged to be October 1st 1905, instead of November 6th 1905 as charged in this case. The second and third counts in the former indictment were in the exact language of the second and third counts of the present indictment, except that the second count charged the offence to have been committed on November 6th
27 1906 instead of October 1st 1905, and by administering medical treatment to one John P. Moody and to a person whose name was to the jurors unknown, and the third count charged the offence to have been committed on November 6th 1906 instead of October 1st 1905 and by administering medical treatment to one Marie Martin.

The plea then averred "that he and the said John A. Watson, defendant in the above recited indictment, are one and the same person and the offence therein set out, and that now charged, are one and the same offence, and that at said trial the only question was whether the defendant could lawfully practice medicine in Allegany County without being registered as a physician and surgeon; that he pleaded not guilty to said indictment and upon trial by a jury was found not guilty."

The second plea was a repetition of the first except the closing

clauses which are as follows, "That he and the said John A. Watson, defendant in the above recited indictment are one and the same person, and that the offence therein set out, and that now charged are one and the same offence. Defendant says that at said trial it was proved without denial that he, the said defendant practised medicine in Allegany County at the time alleged in said indictment and that at said trial the only question at issue was, whether defendant was entitled and qualified (under Art. 43 of the Code subtitle Practice of Medicine) to practice medicine in Allegany County and that by the verdict and judgment in said case it was adjudged that the defendant was so entitled and qualified; and defendant says that the qualification to practice medicine in said county under said law, is now and since said trial has been identically the same as it was at the time of said indictment and trial and that at the time of the alleged unlawful acts set forth in said indictment."

The State demurred to these pleas and the demurrer was sustained.

The defendant then pleaded not guilty and a verdict of guilty
28 was rendered on the first count, with which alone therefore we are now concerned.

If we were required to consider the second and third counts, it is clear that as to them both pleas would necessarily be held bad, provided the defendant was not in fact found by the verdict in the former case to have been duly registered on October 1st 1905, because in all such cases both the *crime defined in the Statute,* and the *act* by which the crime is committed, must be identical 17th Amer. & Eng. Enc. of Law 2nd Edition p. 597: or as stated in U. S. — Raudenbush, 8th Peters 288, "The crime must be the same in law and in fact." If therefore the defendant has *never* been duly registered as a physician, an acquittal for practising medicine on October 1st 1905, could not be a bar to a prosecution for practising medicine on November 6th 1906, because the facts required to support the second indictment would not have been sufficient nor even admissible, to procure a conviction under the first indictment. People vs. Gault 104 Mich. 575, Freeman vs. State 119 Ind. 501, Gormley vs. State 37 Ohio 120.

But if in fact the defendant was duly registered as a physician on October 1st 1905, or if it appears by the record set out in the pleas of former acquittal, that the jury in that case did, by their verdict, find that he was so registered, then such acquittal would be a good plea in bar to any subsequent indictment, because, so long as the statute stands unrepealed, registration would entitle the defendant to practice medicine in Maryland. It becomes necessary therefore to examine these pleas carefully, and the effect of the demurrer thereto, in order to determine whether that issue was raised and determined in the former case, and what is admitted by the demurrer to these pleas.

The defendant contends that the facts alleged in the pleas should have gone to the jury, and they should have found whether or not the offence was being again brought before a jury.

We think it is clear that the first plea was defective. The neces-

sary averment to the personal identity is made, but the iden-
29 tity of offence is not sufficiently averred, because it does not appear therefrom that the *act* by which the offence charged in the former indictment was committed, was identical with the act now charged, nor does it even attempt to aver that by the former verdict the defendant was found to have been duly registered as a practitioner of medicine. Conceding everything alleged in that plea, it does not appear either that the specific *act* charged in the former case was the same act here charged nor does it appear that the former jury found the defendant to have been duly registered as a physician on October 1st 1905, which registration *so found,* would be a protection so long as the law was unrepealed. Nor do we think the second plea can be held good. The averment that "it was proved without denial that he practised medicine in Allegany County at the time alleged in the indictment", is not sufficient. It does not follow that the jury believed the proof. He may have been acquitted because the jury did not find that he practised medicine at all, or if he did, that he did not charge for his services, in either of which cases there could have been no conviction. Nor is the mere allegation of the pleader that by the verdict and judgment in the former case it was adjudged that he was registered as a physician, sufficient to sustain the plea, unless that averment is affirmatively supported by the record set out in the plea; and the demurrer must be taken as admitting only the averments of fact fairly deducible from the record relied on and set out in the plea, but can not be taken as admitting the legal conclusion sought to be drawn from the record by the mere averment of the defendant in the plea. All that this record shows, is that the defendant was acquitted of all the charges in the former indictment, but it is silent as to the particular fact or facts found which led to the acquittal. As was said by Judge Grason in Bell vs. The State, 58 Md. 117, "An acquittal of a party does not ascertain any precise facts. It may have resulted from an insufficiency of evidence as to some particular fact where several fcats are necessary ingredients of the crime. 2 Cowen's Phill. Ev. 55-56. Roscoe's Cr. Ev. 194."

30 In Hite vs. the State, 9th Yerger 357, the Court said, "The plea of *autre fois acquit* is of a mixed nature, and consists partly of matters of record and partly of maters of fact. The matter of record is the former indictment and acquittal. *The matter of fact is the identity of person and offence.* In all cases where the plea consists of matter of record and matter of fact, the issue made thereon is to the country, but this does not take from the Court the right it possesses of determining exclusively, what is of record and what is not."

In that case instead of demurring to the plea the State filed a replication of *nul tiel record* concluding with a verification, and the Court without the intervention of a jury decided the issue upon the replication against the prisoner on the ground that the record which was copied verbatim into the plea did not support it. The Court held that the better practice would have been instead of replying

nul tiel record to have filed a plea of *autre fois acquit* to which a demurrer could be filed.

And in 9th Enc. Pl. & Pr. 640, it is said "when the plea is on its face bad in law, it is demurrable and may be decided by the Court without reference to the jury.

There was no error in the ruling on these pleas, and the judgment must therefore be affirmed.

Judgment affirmed, appellant to pay the costs.

Filed April 24th 1907.

31 Court of Appeals of Maryland, April Term, 1907.

JOHN A. WATSON
vs.
THE STATE OF MARYLAND.

Appeal from the Circuit Court for Allegany County.

Judgment affirmed, appellant to pay the costs, by the Court on the 24" day of April A. D. 1907.

To be reported.

OP. PEARCE, *J.*

Appellant's Costs in the Court of Appeals of Maryland.

| | | |
|---|---|---|
| Record | $10.80 | |
| Brief | 7.00 | |
| Docket Entries | .75 | |
| Appearance Fee | 10.00 | |
| | | $28.55 |

Appellee's Costs in the Court of Appeals of Maryland.

| | | |
|---|---|---|
| Brief | $25.00 | |
| Docket Entries | .90 | |
| Appearance Fee | 10.00 | |
| | | $35.90 |

Test:

C. C. MAGRUDER,
*Clerk of the Court of Appeals of Maryland.*

32 STATE OF MARYLAND, *sct.:*
*Office of Clerk of Court of Appeals of Maryland, ss:*

I, Caleb C. Magruder, Clerk of the Court of Appeals of Maryland, do hereby, in obedience to the Writ of Error herein issued, certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment and all of the proceedings had in the said Court of Appeals of Maryland, in the case between John A.

Watson, Appellant, vs. The State of Maryland, Appellee, including the opinion of the said Court of Appeals, also a true and correct copy of assignment of errors filed by appellant in the said Court of Appeals of Maryland, including all orders and proceedings had in said cause in said Court of Appeals of Maryland.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the said Court of Appeals of the State of Maryland, at the Capitol at Annapolis, Maryland, this 20th day of May, A. D., 1908.

[Seal Court of Appeals, Maryland.]

C. C. MAGRUDER,
*Clerk of the Court of Appeals of Maryland.*

Endorsed on cover: File No. 21,224. Maryland Court of Appeals. Term No. 174. John A. Watson, plaintiff in error, vs. The State of Maryland. Filed June 11th, 1908. File No. 21,224.

| | |
|---|---|
| JOHN A. WATSON,<br>Plaintiff in Error,<br>vs.<br>THE STATE OF MARYLAND,<br>Defendant in Error. | SUIT PENDING IN THE SUPREME COURT OF THE UNITED STATES. |

And now comes John A. Watson, plaintiff in error, and moves the Court to advance this cause and set the same down for submission at as early a date as is possible at the October Term, 1908, and shows:

First. That this was a suit brought in the State Court of Maryland, by the State of Maryland against John A. Watson, for alleged violation of a statute of the State of Maryland known as the Practice of Medicine Act of 1902, Chapter 612, the suit being a criminal suit to recover a penalty for the violation of said Act. A trial before the Court and Jury resulted in a verdict and judgment in favor of the State of Maryland.

The judgment was affirmed by the Court of Appeals of Maryland upon regular hearing, it being the highest Court in the State in which said case could be heard, and it is now here for revision and correction.

Second. The plaintiff in error would show that he is attacking the constitutionality of the above Practice of Medicine Act and it is of utmost importance to him to have the case tried as it has broken up a lucrative practice for him and he is still prevented from properly pursuing his profession and is held guilty of a grave criminal charge.

Third. That the plaintiff in error is also entitled to have as speedy a determination of the matter as the convenience of this Court will permit because of the matter and things involved in this controversy.

Wherefore, the plaintiff in error respectfully requests this Court

to advance this cause and set the same for submission at as early a date as is convenient and practicable to the Court at its October Term, 1908.

FERDINAND WILLIAMS,
CHAS. G. WATSON,
Attorneys for Plaintiff in Error.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

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## No. 174.

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JOHN A. WATSON, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF MARYLAND, DEFENDANT IN ERROR.

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## BRIEF FOR THE PLAINTIFF IN ERROR IN REPLY TO THE BRIEF FOR THE DEFENDANT IN ERROR.

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The defendant in error in its brief starts out by stating that the plaintiff in error was convicted on the first count only. What difference it makes on what count he was convicted we cannot see, as the question of the constitutionality of the statute was raised by the demurrer before the conviction, or even the trial.

2. On page 2 of its brief the defendant in error says: "It is respectfully submitted that there was no merit in this demurrer," and then proceeds to state several principles of law and cites a lot of authorities, on which I presume nobody differs with the learned Attorney General of the State of Maryland, but how does that help the court? I pre-

sume the court has known these general principles of law for some time. Why ignore our contention? He got a copy of the plaintiff's brief in error four or five days before he filed his own—in fact, our brief was filed in this court early in January. What we would like to know (and I presume the court would also) is how he harmonizes certain provisions of the statute with the law he lays down, and not whether the State has the right to pass an act regulating the practice of medicine and surgery. Nobody disputes that, but the whole question here is as to the provisions the act contains.

3. Why does he not explain how 12 patients would fit a man for the practice of medicine and surgery, if done before the 1st day of January, 1898; why does he not show the reasonableness of allowing a man to commence the practice of medicine on the 1st day of January, 1898, who, within the year before that date, had treated only 12 patients, it matters not for what or with what success, and excludes the man that commenced on the 1st day of January, 1898, who may hold a diploma from any school in the United States and also one or more from foreign countries; why should 12 patients better prepare a man for the practice of medicine and surgery than any number of years of schooling? The statute does this, as he or any one can readily see, and our brief calls his attention to it, and he makes no reply—he must agree with us that it is unexplainable. He should explain the reasonableness of the statute providing for the admission to the practice of medicine and surgery the man with 12 patients before January 1, 1898, and providing for the admission of those who commenced after the 11th day of April, 1902, by examination and making no provision for those that commenced to practice between those two dates, to which class the plaintiff in error belongs.

4. He should show how to reconcile that part of section

43 of chapter 612 of the acts of 1902, or section 83 of article 43 of the 1904 Code of Maryland, which says:

> "Who shall commence the practice of medicine or surgery in any of their branches after the passage of this act, shall make a written application for license to the president of either Board of Medical Examiners which said applicant may elect, *accompanied by satisfactory proof that the applicant is more than twenty-one years of age, is of good moral character, has obtained a competent common-school education, and has either a diploma,*" &c. * * *

Whole section is set out on page 3 of first brief, with the case of Yick Wo *vs.* Hopkins, Sheriff, 118 U. S., 121.

5. Here the applicant is at the mercy of the president of the Board of Medical Examiners, for him to say what is satisfactory proof of his age, character and education, no rule given by the legislature as to what shall be satisfactory proof, but leaves it entirely to the said president what shall be satisfactory proof in each case, can anything be more arbitrary?

6. And at the bottom of page 3 of original brief in said statute will be found these words:

> "Proof of the qualification of applicants, as above, shall, if required, be made by affidavits at the time of the making of said application and payment of fee as provided. The president of the board to whom such application shall have been made, if satisfied with the same, shall direct the secretary-treasurer thereof, to issue to said applicant an order for examination."

As though the requirements were not already arbitrary enough, the president must be given the power to require no proof if he does not want to, or he may demand anything he may want to say is satisfactory, and nothing that the ap-

plicant may be able to produce may be sufficient to satisfy him. The Attorney General ought to have shown us how to harmonize this with the case of Chy Lung *vs.* Freeman *et al.*, 92 U. S., 278 to 279.

7. And to show what can happen under this law I will state what did happen in this case with the plaintiff in error. He studied medicine for five years, graduated next to the highest in a class of 35. The plaintiff in error and the man at the top of the class tried the examination twice each, under this law, and both failed, and some at the bottom of the class passed, and the law provides that the examination papers be kept for three years (page 2 of the brief). One of the attorneys for the plaintiff called upon the secretary-treasurer of the said board and told him that he was attorney for Dr. John A. Watson and would like to see his examination papers, and he refused and said that he would have to place it before the board. Some time after the attorney received a letter from the secretary-treasurer saying that the board refused to allow the examination papers of Dr. John A. Watson to be seen. Now, whether the law gives him that right or not, common, ordinary fairness would.

8. The Attorney General, in his brief, should have explained how the clause in said section, on page 3 of brief, can comply with the Fourteenth Amendment, which clause reads, "provided, that this requirement shall not apply to any physician who shall, prior to the passage of this act, have practiced outside of this State for at least three years, and who shall have been duly registered or licensed in the place where he has so practiced." Why should they require only three years' practice outside of the State of Maryland and four years of practice in Maryland would not give that right? The "duly registered" clause should not avail anything, for in some States a diploma gives the right to register, as it did in Ohio at that time. So two young men could have gradu-

ated in any Ohio college in 1899, and one of them registered his diploma in Ohio and practiced three years; the other one come to Maryland and practiced the three years, and he would not have been entitled to the same privileges. What relation has such a discrimination as that to qualifications?

9. Now, just a word more about the "12 patients" clause. You will take notice that it does not require a continuous practice from January 1, 1898, up to the 11th day of April, but to only have treated 12 people before January 1, 1898, and to be in practice April 11, 1902. No requirements for education or moral character. He need not be able to read or write. He could have treated his 12 patients before January 1, 1898, and performed a criminal operation on one of them and been sent to the penitentiary, and got out a few days before April 11, 1902, and started to practice, and by making affidavit to his 12 patients he is entitled to be registered, and the graduate with one or more diplomas, who may have started to practice on the 1st day of January, 1898, and continued to do so up to April 11, 1902, if permitted, under the act, at all, has got to furnish proof satisfactory to the president of said board of good moral character and a common school education, and the said president can make a common school education mean whatever he sees fit, and can require any kind of proof he may see fit and then not be satisfied if he does not want to be. Hawkes *vs.* New York, 170 U. S., 194.

10. The Attorney General should have shown us how to harmonize these requirements with the general principles of law laid down by him quoted almost verbatim from the decisions of this and other courts.

11. Now as to the objections urged against the provisions or exceptions by the plaintiff in error contained in section 61 of said chapter 612 of the acts of 1902 or section 101, article 43 of 1904, Code of Maryland, the Attorney General

pays scarcely any attention. Now, that section contains eleven exceptions, and he mentions one of them on page 6 of his brief, the most reasonable one of the whole lot, we might almost call it a necessary exception, and that is in reference to a physician who may be called for a special case from another State and says the law applies to all physicians except these. He seems not to have read the section. The law as it was before 1902 had three exceptions, as quoted in our brief on page 8, and which the Court of Appeals of Maryland held to be reasonable in the case of School *vs.* State, 90 Md., 729, and the reason given by the court is quoted in our brief on page 8, and of which we make no complaint.

12. The court, in that case, seemed to take special care to show that all three of the exceptions were reasonable and just, and we believe that it succeeded in doing so, but that decision was given about two years before the law we complain of was enacted. Why the Attorney General mentions an exception that we do not complain of and then pass the whole matter by is a mystery to us. Our brief surely sets it out clear enough to show which parts of the section we complain of, yet the Court of Appeals seems to have committed the same error. In the opinion written by Judge Pearce, at the bottom of page 15 of the record, he says the third and fourth classes were considered in School *vs.* State, and the classification was sustained as just and reasonable. That has not been disputed or even questioned in this case. He also says that "it was also held in that case that persons temporarily practicing under the supervision of an actual medical preceptor, who were by the act of 1892 exempted from the provisions of that act, constituted a reasonable and proper class for such exemption." The learned judge seems to have overlooked the fact that the legislature in 1902 repealed that part of the act of 1892 and left out the words "under the supervision of an actual medical preceptor," and says that nothing in this act shall apply to "students at hospitals or dispen-

sary duties, or in the office of physicians." Now when the legislature repeals an act and re-enacts and leaves out the supervision clause, a clause that they knew the Court of Appeals had taken great care to explain and apparently held it valid on account of that clause, it cannot be said they did not intend to leave it out, and the court cannot still read it into the new act.

13. But why the Attorney General and the court also content themselves by discussing the classes decided in a former case when the law was different and nobody has assailed them and pass the new classes, created by the act of 1902, by without a word of comment when they are most vigorously assailed, we cannot help but be amazed. Said section 61 says: "But nothing herein contained shall be construed to apply to gratuitous services, *nor to any* resident or assistant resident physician or students at hospitals or dispensary duties." This exception or class surely needs some explanation to show why it does not infringe on the Fourteenth Amendment. He should have at least made some attempt to show how that could in any way bear equal upon people in the same class or why it does not make two classes where in reality there is and should be only one—one a very much favored class and the other with all the burdens possible piled upon it.

The law nowhere defines what a hospital is or what it shall be, nor makes any provision who shall operate a hospital, nor are they under any kind of State control or authority. Yet two young men may graduate with equal honors; one of them has money enough to set up a hospital; he need not pass any examinations of any sort; does not have to even register; no common-school education to comply with; no evidence of moral character to furnish; even his diploma is not needed, because the law says, "but nothing herein contained shall apply to him." The other young man has no money, and he wants to settle down in some neighborhood and practice medicine, but he finds that he has got to satisfy

some gentleman whom the Medical Association, a private corporation, has named as president of the Board of Medical Examiners, and on whom the law, in reality, places no legal responsibility and lays down no rules to govern his actions, of his moral character, age, and education, and if he succeeds in doing this, then he must stand a rigid examination, and by this legally irresponsible board, vested with the most arbitrary power and appointed by a private corporation. The law provides for no appeal or redress of any kind. If this is equality under the Fourteenth Amendment, we must confess that we have no conception of what the word equality means. And why no light upon this from the Attorney General? Surely we said enough in our brief from page 10 to the end to call his attention to it, and why could it not draw a few words or even a passing remark from the Court of Appeals in the opinion? It was there urged in both the brief and argument.

14. The exceptions to chiropodists, midwives, and assistant resident physicians at hospitals was also urged, but all meet the same fate at the hand of the Attorney General and also the court; not a word can they draw from either.

15. These contentions deserve some attention, even though there was absolutely no merit in them, when they were made one of the principal points of the appeal, especially when the Attorney General and also the Court of Appeals appear to have time to discuss points about which there was or is now no contention. Our appeal seems to have been entirely misunderstood and overlooked by the Court of Appeals.

16. Now, just a word about the protection of the public in reference to this hospital class. As we understand the Fourteenth Amendment as heretofore construed by the courts, if this division of doctors into two classes, viz., those that practice outside of hospitals and those that practice inside of hospitals, were necessary for the protec-

tion of the public, then we would have no grounds for our complaint on this point; or if there was some other plan by which the competency of the hospital doctors was ascertained that was as equally efficient, then our complaint about this classification might be of no avail. Can there be one single reason urged why a hospital doctor should not be just as learned in his profession as his brother on the outside of the hospital? The diseases treated in a hospital are the same as those treated in the home; the wounds to be treated and the operations to be performed are just as serious as those in the home, and are they not very often more so?

17. Why should he not be just as well educated? There is just as much need of refinement in a doctor in a hospital as one in the home. And, above all, why not any moral requirement of a hospital doctor? These moral requirements, we presume, are principally for the protection of female patients. Now a great many female patients go to a hospital where the resident physician is in absolute control of the institution. His assistants, if he has any, the nurses, and everybody are under his control. Why does not a female patient need a moral doctor there just as much as she does in her home, where she is generally surrounded by friends and relatives not under the doctor's control?

113 U. S., 31.

18. Then, again, a hospital with an immoral doctor, who can very easily surround himself with immoral nurses and other attendants, can very easily become a menace to the State. Criminal operations are more easily performed and with less danger of detection in a hospital than anywhere else.

Yet under this classification a hospital doctor may be a man who never saw the inside of a medical school, who has no education, and who has spent a good deal of his time in prison. He need not even have treated 12 patients. We know that this sounds too awful to be true, but we defy

the Attorney General to show one thing in the law to prohibit it.

Then, again, a hospital, under the rules of medical ethics, is allowed to advertise, while a doctor outside is not. Now, a hospital may have many patients who know nothing about the hospital except what they learn from its advertisements, while another doctor generally becomes known in the community in which he practices his profession and the people have some opportunity to judge of his qualifications and ability. We then submit that it would have been more reasonable to have this statute apply to hospital doctors and exempted all others.

19. Now there must be some reasons for all of the exemptions, exceptions and classes created by this statute. Some doctors no doubt must be saved who could not possibly comply with the provisions of the act, and the Medical Board, with its arbitrary power, could limit the supply of doctors in Maryland as they see fit.

And some of the hospitals would be able to pick up some very bright young men at very reasonable salaries for their physicians that had been unable to pass a board armed with such arbitrary power.

Now it is almost a universal rule that these medical laws are gotten up by the medical association of the State by which they are enacted. Can a medical association that would get up a law containing such unfair exceptions and classification and giving a board, which it itself is to appoint, such arbitrary power, be trusted to appoint honest and capable men to said board?

20. Now to our first point, that of due process of law. The Attorney General in the second division of his brief, from page 8 to 14, quotes a lot of law and authorities which miss the mark altogether. Whether we are right or wrong, he throws no light on the subject.

We do not contend that any one commencing the practice

of medicine after the 11th day of April, 1902, would be entitled to have the notice provided for, but we do believe that the law intended that the notice should be served on those that commenced to practice before the 11th day of April, 1902, that the law intended that they should have actual and personal notice of the law and its provisions before their practice should be broken up.

We can find no authorities that exactly decide this point either for or against us and will not bother the court with a lot of authorities that do not apply.

21. Now the third and last division of the brief for the defendant in error, from page 14 to page 23, is taken up with arguments and authorities to show that all of our pleas were bad except the plea of not guilty. We paid no attention to this part of our appeal in the first brief because we could see no Federal question in it. But the Attorney General must see something in it when he devotes 9 pages out of 23 of his brief to that point. It would possibly come in under due process of law or the court could consider the point as a part of the whole case when the other questions raised are without doubt Federal questions.

22. We think the trial court committed an error by sustaining the demurrer to the said pleas of former acquittal, and also the Court of Appeals committed error by affirming the trial court. Now it will be noticed that the said section 43 of chapter 1902 of said act, page 3 of our first brief, does not specifically provide any way by which those doctors that commenced to practice after the 1st day of January, 1898, and before the 11th day of April, 1902, could register or be examined, to which class the plaintiff in error belongs. Now the plaintiff in error was indicted sometime before this time and tried by a jury, and, on a plea of not guilty, was acquitted. Now if the jury, who are the judges of both the law and the facts in Maryland, acquitted him on the theory

that as the law provided no way by which he could register and that the law did not apply to him, then that settled that question so long as the law remained as it was then; and there is no doubt but that was the theory upon which the jury did acquit him, and the demurrer to the pleas should have been overruled and the jury should have been allowed to find whether he had been acquitted on that ground or not. His right to practice, by finding that the law did not apply to him, was settled, it being a criminal statute. And under the constitution of Maryland a party can be put in jeopardy but once, and he, having been found not guilty of practicing medicine without being registered, was placed in jeopardy twice for the same offense.

23. Now that the Court of Appeals of Maryland, having ignored or overlooked our contentions in this case and the Attorney General has failed to answer any of the most important errors urged by us and specifically called to his attention, are we not justified in concluding that he can find no answer to them.

Respectfully submitted,

CHAS. G. WATSON,
FERDINAND WILLIAMS,
*Attorneys for Plaintiff in Error.*

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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*NO. 174.*

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JOHN A. WATSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND, DEFENDANT IN ERROR.

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## BRIEF FOR PLAINTIFF IN ERROR.

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The writ of error in this case is from the judgment of the Court of Appeals of Maryland, the highest Court in Maryland in which the case could be tried, which judgment affirms the judgment of the Circuit Court of Allegany County whereby Plaintiff in error is convicted for that he did unlawfully practice medicine in violation of the Act of the General Assembly of Maryland passed in 1902 and from the final judgment of said Court overruling the demurrer to the indictment in said case.

The first objection raised by the plaintiff in error was in reference to due process of law. Section 40 A. Chapter 612 of the Acts of the General Assembly of Maryland of 1902, which was approved on the 11th day of April 1902, and took effect from the day of its passage and which read as follows:

"Each of said boards shall, at its meeting on the first Tuesday in June of each year, appoint a Secretary-Treasurer for the Board, whose term of office shall last for one year, and

who shall be eligible for re-appointment, and whose duties shall be as follows: Within sixty days from the time of his appointment by his respective board, it shall be the duty of the Clerk of the Circuit Court of Baltimore City, and the Clerk of the Circuit Courts of each County in the State, to furnish the secretary-treasurer of each board a list of all physicians who have been legally registered in such Court. To all those physicians who have at that time been practicing in the State without having been legally registered said Secretary-treasurer shall send a printed notice of the section of this Act relating to the duty of the Police Commissioners in Baltimore City and the Sheriffs of the Counties of the State under this law. Within four months of the time of his appointment he shall see that all physicians entitled to register have been registered, and that the names of all those who are not entitled to be registered under this Act have been presented for prosecution to the State's Attorney of the City of Baltimore, and of each County in the State in which the accused, respectively, reside. Those physicians, who, being entitled to register under this Act yet have failed to comply at the expiration of this time—four months from the election of the secretary-treasurer of the board-shall also be prosecuted, and no one after the passage of this Act shall be allowed to practice medicine or surgery without being duly registered according to the provisions of this Act. The secretary-treasurer shall keep the official records of the board for which he is secretary, as provided for in section 41 of this Act, the examination papers of applicants for at least three years, after they have been passed upon by the board, after which they are to be destroyed, and a complete list of all the registered physicians in the entire State. He shall call to the attention of the State's Attorneys of Baltimore City and of the different Counties throughout the State all violations of the law under this Act. He shall collect and hold all moneys belonging to the board, for which he shall give bond to the State of Maryland in the sum of $1,000, the same to be held by the president of the board. He shall receive from the income of the Board such salary as his respective board may determine."

By this section all physicians who were then practicing medicine in the State of Maryland were to be notified within 60 days after the first Tuesday in June, 1902, and the physicians notified were to have four months from said first Tuesday to register and those that did not comply with said notice within four months from said Tuesday in June were to be prosecuted, Now under this section all those physicians practicing

at the time of the passage of this act, as in this case, were to be notified. But the trial Court said that no notice was necessary and the Court of Appeals of Maryland affirmed said ruling, page 12, paragraph 20 of the Record.

The plaintiff was therefore indicted, tried and convicted without due process of law.

The second objection raised by the plaintiff in error, which contains a Federal question is to Section 43 of Chapter 612 of the Acts of the General Assembly of Maryland of 1902 which section is as follows: "All persons, except physicians who were practicing medicine in this State prior to the first day of January 1898, who are now practicing medicine or surgery and can prove by affidavit that within one year of said date said physician had treated in his professional capacity at least twelve persons, who shall commence the practice of medicine or surgery in any of their branches after the passage of this Act, shall make a written application for license to the president of either Board of Medical Examiners which said applicant may elect, accompanied by satisfactory proof that the applicant is more than twenty-one years of age, is of good moral character, has obtained a competent common school education, and has either received a diploma conferring the degree of doctor of medicine from some legally incorporated medical college in the United States or a diploma or license conferring the full rights to practice all the branches of medicine and surgery in some foreign Country; said diploma if from a College in the United States, must have been conferred by a legally incorporated College requiring a four years' standard of education as defined by the American Medical College Association or the Intercollegiate Committee of the American Institute of Homeopathy, respectively, provided; that this requirement shall not apply to any physician who shall, prior to the passage of this Act, have practiced outside of this State for at least three years, and who shall have been duly registered or licensed in the place where he has so practiced; provided further, that two courses of medical lectures, both of which shall either begun or completed within the same calendar year, shall not satisfy the above requirments; provided also, that in the case of students who at the time of the passage of this Act shall be in their second year in a Medical College, a three years' course of study, or attendance on three courses of lectures delivered in different years, shall satisfy said requirements. Proof of the qualification of applicants, as above, shall, if required,

be made by affidavits at the time of the making of said application and payment of fee as provided. The president of the board to whom such application shall have been made, if satisfied with the same, shall direct the secretery-treasurer thereof, to issue to said applicant an order for examination, and when said applicant shall have passed an examination as to proficiency satisfactory to said board, the president thereof shall grant such applicant a license to practice medicine and surgery in the State of Maryland. If the president of either board of Medical Examiners shall have refused any application, either for want of qualifications necessary to entitle such applicant to an examination, as hereinbefore provided, or for want of proficiency of such applicant upon being subjected to an examination, then the president of neither of said boards shall entertain or pass upon a subsequent application from said applicant until after the expiration of six months from the rejection of said previous application. The respective boards are authorized to license without examination, applicants who present proper certificates of proficiency and professional standing at the time of application, issued by boards of medical examiners of the District of Columbia and of other States, the requirements of which are of as high a standard as those governing boards of medical examiners of this State; provided such boards of such states or district grant the same privilege to licentiates of the examining boards of Maryland, such applicants, however, being still required to furnish the same proof of qualifications required of other applicants by this section. Medical students at the end of their second year of study, who have, as verified by the certificate of the dean of the College which they have attended, completed the studies of anatomy, physiology, medical chemistry and materia medica in said college, shall on application, be examined in such studies by the State licensing board, the result of said examination to be considered as part of the final examination, the full regular fee to be paid at this time, no part thereof to be returned, but placed to their credit for the remainder of the examination yet to be taken. Medical students who have, as verified by the certificate of the dean of the college which they have attended, completed a full four years' course of studies and lectures, but who have not yet received their diplomas, shall upon application be examined in all the branches enumerated in section 42 of this Article by the State licensing board, the final certificate and license of the said board being withheld until the diploma of the proper medical college, with the candidate's name inscribed, be produced to

the secretary of the board. Diplomas presented by graduates of foreign colleges shall be accepted if a course of four years' study has been required by said foreign college before issuing such diploma." This section seems to be enacted with a view of getting certain persons admitted to the practice of Medicine rather than prescribe any rule whereby the fitness of such persons could be ascertained or even whereby it might even be presumed. Chapter 296 of the acts of 1892, had made it illegal to practice medicine without license, ten years later in 1902, by said section 43 the Legislature divides those then practicing medicine illegally into two classes, one class of persons it permits to continue to practice, the other class it prohibits from practicing.

Now if this division of persons similarly situated and following the same profession is reasonable and is necessary for the protection of the health and lives of the people, then no one has a right to complain and the 14th amendment does not apply in this case. But let us see how they separate the physicians then practicing illegally in the two classes.

They take the past ten years and arbitrarily fix a date about four years back, viz· January the 1st, 1898, and say to any person that if you can show that you have treated twelve persons in a professional way before that date you can practice medicine and surgery (without any reference to the nature of the treatment or any requirments for any operation.) To the man that may have commenced to practice on the first day of January, 1898, and had spent years in school in this and other Countries prior thereto, it says that you can not practice and you are a criminal and must be punished and society must be protected against you, and to the quack it says, you may go on preying on society and we will give you license to do so. Your twelve patients better fits you for the practice of medicine (even though they all may have died) than years of schooling has fitted this other man, provided it was done before January 1st, 1898, (whether the Legislature thought that day had some magic virtue in it or some particular person would be saved by that date, we are unable to say.) Both men may have been in continual practice since that time up to the passage of this act. Now if this division into classes of men in the same profession and similarly situated is reasonable and just and is necessary for the protection of the public, then we can conceive of no division of classes that would be unresonable, or no qualification could be prescribed by the Legislature that would not be necessary for the

protection of the public, even though they be as absurd
Esop's fables.

It does not make the division of classes on years of pra
tice, but just arbitrarily sets a day as a point, or a drawn lin
and makes the treatment of twelve people in a professiona
way (it mattets not for what) stand above any number
years schooling and professional training on this one partic
lar day. In other words it makes twelve infractions of t
law if done before a certain day, (for it was illegal on this da
to practice medicine without examination and license and ha
been for six years before) a better qualification than years
training in the best Medical College in the world. Can t
most fantastic imagination get up anything more absurd?

If this kind of class legislation is Constitutional sure
any kind is, but Class Legislation less unreasonable has bee
declared unconstitutional in some of the following cases:

Dent vs. West Virginia, 129 U. S. 121 and 124.
Tick Wo. vs. Hopkins, Sheriff, 118 U. S. 356.
Leeper vs. Texas, 139 U. S. 462.
Gulf, Colorado and Santa Fe R'y Co. vs. Ellis 16
U. S. 150.
Pennoyer 65 N. H. 113; 51 L. R. A. 709.

There is a difference in this case to other cases whe
the Legislature prescribed a certain number of years of practi
would permit a physician to register and practice medici
with those that took an examination and which have bee
held constitutional. In those cases there had been no licens
for the practice of medicine and surgery required before t
passage of the law, and these physicians had practiced for t
required number of years legally but in this statute the Legi
lature ignored this and every other fact and divided all tho
physicians that had commenced to practice medicine witho
registering in the ten years prior to April 11th 1902 into tw
classes, viz. All those that had treated twelve persons in
professional way before January 1st, 1898, are in the favore
class and all otheres are placed in the unfavored class, it ma
ters not how they got their professional knowlege or ho
much skill they had shown that they possessed during the
practice prior to April 11th, 1902, and after January 1st 189
and many no doubt as in this case had lucrative practices bro
en up and destroyed by this unreasonable unfair and unju
piece of Class Legislation.

The third reason, containing a Federal question urged in support of the demurrer before the Circuit Court and the Court of Appeals are the exceptions or classifications made by section 61 of this Act, Chapter 612 of the acts of 1902, which is as follows: "Any person shall be regarded as practicing medicine within the meaning of this Act who shall operate on or prescribe for any ailment of another, or who shall append to his or her name the letters of M. D., or prefix the word Doctor, or the abbreviation thereof, Dr., to his or her name, with the intent thereby to imply that he or she is a practitioner of medicine or surgery, but nothing herein contained shall be constructed to apply to gratuitous services, nor to any resident or assistant resident physician or students at hospitals or dispensary duties, or in the office of physicians, or to any physician or surgeon from another state, territory or district in which he resides when in actual consultation with a legal practitioner of this State or to commissioned surgeons of the United States Army or Navy or Marine Hospital service, or to chiropodists, or to mid-wives, or to messeurs or other manual manipulators, who use no other means; nor shall the provisions of this Article apply to physicians or surgeons residing on the borders of a neighboring State, and duly authorized under the laws thereof to practice medicine or surgery therein whose practice extend into the limits of this State; provided, that such practitioners shall not open an office or appoint places to meet their patients or receive calls within the limits of this State without complying with the provisions of this Act; provided, that the same privileges be accorded to licensed physicians of this State; provided, further, that nothing in this act shall annul any of the Acts of the present dental law of the State of Maryland, nor shall apply to any registered graduate of dental surgery now practicing in the State of Maryland, with the sign titles; Dentist, Surgeon Dentist, Dental Surgeon or Stometelogist."

This section shows that there are eleven exceptions or classes that do not come under the law, first gratutious service; second, resident physicians at Hospitals; third, assistant resident physicians at Hospitals; fourth, Students at Hospitals; fifth, Students in the office of Physicians; sixth, physicians or surgeons from another State; seventh, Commissioned Surgeons of the United States Army or Navy or Marine Hospital Service; eighth, Chiropodists; ninth, mid-wives; tenth, masseurs or other manipulators who use no other means;

In the case cited the Court said the public had protection in each one of the exceptions, as the qualifications of each class was passed upon by some proper authority, but what protection has the public against a physician or surgeon in a private hospital of this State which may be owned by any set of men, corporation or individual, or even by the physician himself. An ignorant physician or surgeon or a quack is more dangerous in a hospital than he would be in general practice, as only the dangerously sick or persons having dangerous operations to be performed go to a hospital and they are entirely under the physicians control. The public, and particularly that portion of the people who need the protection of the State against quacks most, has more confidence in a hospital doctor than in a physician in general practice, yet this law requires absolutely no qualifications of him whatever, and permits a hospital to advertise and hold out to the public the best methods of treating diseases and performing operations. If this exception does not render this law unconstitutional under the 14th amendment of the Constitution of the United States, then it is a rope of sand indeed. This classification has no relation whatever to the subject and cannot be called reasonable. State of N. H. vs. Pennoyer, 65 N. H. 113, 5 L. R. A. 709.

There can be no reason given for this section, it cannot be shown where the public has any protection whatever from ignorant doctors in these hospitals there is no body to pass upon their fitness, for the resident physician and any assistant physician of any hospital need not undergo any examination or have any license, and there are no restrictions in the law upon the building and maintaining of hospitals by any person or set of persons.

All that has to be done is to put up a building or rent one, put in a few beds, have a few instruments and some medicine and call it a hospital and any man can practice medicine, perform any operation that may come to him and do anything that a regular physician can do, although he may have never seen the inside of a medical college or read a medical book, and yet this exception or classification protects him and gives no protection to the unsuspecting public at all. And the Court does not in its opinion in this case attempt to find any reason or excuse for this exception or classification, as it did in the Schoole case, but passes it over as of no moment at all, when in fact it would be hard to think of an exception that would be fraught with more danger to the public and would be more

unfair to the members of the medical profession. The law compels the regular practitioner to have a diploma from a college in good standing, then to pass a rigid examination before a State Board, appointed by a private corporation, and then to be licensed and have his license recorded, and the same law provided a luxurious home for the quack, (if he has a little money) where he is free from diplomas, examinations and licenses, for the very name hospital inspires confidence and gives to the public insurance of superior professional ability, as being the best place to have treated the most serious and delicate surgical operation; and hospitals advertise, while doctors in regular practice do not. All these things renders an incompetent doctor much more dangerous in a hospital than he is in general practice.

Almost the same thing can be said of the third and fourth exceptions or classifications, assistant physicians and students at hospitals, as the law does not define what their duties shall be or under what supervision they shall be performed.

The fifth exception is one fraught with great danger and grave consequence. Under the Act of 1892, persons in the office of physician could only practice under the supervision of an actual medical preceptor; but under the Act of 1902 that safeguard was removed, and a student in an office of a physician can do anything he sees fit to do, the only requirement is that he be in the office of a physician, but he need not be under his supervision; he may administer the most deadly drugs or perform the most delicate operation without being under the control or supervision of any one. And it cannot be said that the Legislature intended that such persons should practice under their medical preceptor, because the Legislature removed the language from the Act of 1892, limiting the practice of such person to the supervision of an actual preceptor.

The 8th exception is to chiropodists, who is a doctor that treats diseases or performs operations on the hands and feet. It surely seems strange that this part of the anatomy of the human body should need no protection at all.

The 9th exception is to mid-wives. Under the former law it only excepted any mid-wife or person who might render gratuitious services in case of emergency, but under the present law any person may make a business of practicing as a mid-wife, yet the practice of obstetrics is considered one of the most complicated and delicate branches of the profession of medicine and surgery—it partakes of both. It is looked upon to be so important that most colleges have special courses in obstetrics.

There is no branch of practice more dangerous to human life than this, yet the Legislature of Maryland seemed to think that the life of the mothers of the State of Maryland need no protection at all.

Now if all the above exceptions or classes made by the Legislature are reasonable and necessary to protect the public, then this law is Constitutional. But if on the other hand it makes classifications that are unnecessary and without due regard to the fitness of the persons composing some of the classes, or imposes greater burdens on some than on other persons similarly situated, then it must be in conflict with the 14th Amendment, by all the decisions both State and Federal.

Caldwell vs. Texas, 137 U. S. 692, 697.

And we respectfully submit that it not only makes unnecessary and unjust classifications and imposes greater burdens on some than on others similarly situated, but it leaves the public unprotected where it most needs it and creates a haven for quacks, where they may prey upon the unsuspecting and confiding public without being molested.

And the Court of Appeals were unable to assign any reason for these exceptions or classifications at all.

Respectfully submitted.

CHAS. G. WATSON,
FERDINAND WILLIAMS,
Attorneys for Plaintiff in Error.

In the

# Supreme Court of the United States.

October Term, 1909.

## No. 174.

JOHN A. WETSON,

Plaintiff in Error,

vs.

THE STATE OF MARYLAND,

Defendant in Error.

## BRIEF FOR THE STATE OF MARYLAND, DEFENDANT IN ERROR.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1909.

JOHN A. WATSON,

*Plaintiff in Error,*

*vs.*

THE STATE OF MARYLAND,

*Defendant in Error.*

## BRIEF FOR THE STATE OF MARYLAND, DEFENDANT IN ERROR.

The plaintiff in error was indicted in the Circuit Court for Allegany county, Maryland, on January 11, 1907, for practising medicine and surgery in the State of Maryland without being duly registered as a physician and surgeon, as required by Section 99 of Article 43 of the Code of Public General Laws of 1904. He was convicted and the judgment was affirmed by the Court of Appeals of Maryland. The writ of error in this case is from the judgment of the Court of Appeals, the highest Court in Maryland.

There were three counts in the indictment, but as the plaintiff in error was only convicted on the first count, it is not necessary to concern ourselves with the others.

The first count reads, as follows:

"The jurors of the State of Maryland, for the body of Allegany county, do on their oath present, that John A. Watson, late of Allegany county aforesaid, on the 6th day of November, in the year of our Lord nineteen hundred and six, at Allegany county aforesaid, unlawfully did practise medicine and surgery in the said State, without being then and there duly registered, as a physician or surgeon in the registry of physicians and surgeons, in accordance with the provisions of the Act of Assembly in such case made and provided; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State."

On January 14, 1907, the plaintiff in error demurred to the indictment, which demurrer was overruled on January 28, 1907.

It is respectfully submitted that there was no merit in this demurrer.

The law providing for the registry and official examination of physicians and surgeons before they are permitted to practise medicine is constitutionally valid, as clearly within the police power of the State, and as not repugnant to any clause of the State or Federal Constitution.

Manger vs. Board of Medical Examiners, 90 Md. 659.

Scholle vs. State, 90 Md. 729.

State vs. Knowles, 90 Md. 646.

Dent vs. West Virginia, 129 U. S. 626.

Williams vs. Dental Examiners, 93 Tennessee, 619.

"The power of a State to make reasonable provisions for determining the qualifications of those engaging in

the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions is not open to question."

Per the late Mr. Justice Brewer in Reetz vs. Michigan, 188 U. S. 506.

See also—4 Encyclopedia of U. S. Sup. Ct. Reports, page 377.

State vs. Webster, 150 Indiana, 607.

The validity and constitutionality of the statute here in question are now indisputably settled by the authorities.

In the case of Dent vs. West Virginia, 129 U. S. 114, a similar statute was held to be free from conflict with the Federal Constitution.

The legislation there under consideration was a West Virginia statute (Sections 9-15, Chapter 93, 1882), which required every practitioner of medicine in that State to obtain a certificate from the State Board of Health that he is a graduate of a reputable medical college in the school of medicine to which he belonged, or that he has practiced medicine in the State continuously for ten years prior to March 8, 1881, or that he has been found upon examination to be qualified to practice medicine in all its departments, and subjected a person practicing without such certificate to prosecution and punishment for a misdemeanor. This statute, it was contended violated that clause of the Fourteenth Amendment which declares that no State shall deprive any person of life, liberty or property without due process of law. This Court, however, held it to be valid.

Mr. Justice Field, in delivering the opinion of the Court, said:

"The unconstitutionality asserted consists in its alleged conflict with the clause of the Fourteenth Amendment, which declares that no State shall deprive any person of life, liberty or property without

due process of law the denial to the defendant of the right to practise his profession without the certificate required, constituting the deprivation of his vested right and estate in his profession, which he had previously acquired.

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions. * * * The interest, or as it is sometimes termed, the estate acquired in them, that is the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of the failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people, authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practise of different States from time immemorial to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their

necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised, because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his rights to pursue a lawful vocation.

"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practce in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected.

It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practise, but for the earnestness with which the plaintiff in error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practise without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the Legislature to deprive anyone of any of his rights. No one has a right to practise medicine without having the necessary qualifications of learning and skill; and the statute only requires of whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications. * * *

"There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians except those who may be called for a special case from another State; it imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by a board of health as to his qualifications where he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practised in the State a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that

a remedy would be found in the Courts of the State * * * The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust in confidence those receiving a license under authority of the State."

So again in Hawker vs. State of New York, 170 U. S. 189, where the enactment assailed prohibited from practicing medicine persons who had been convicted of a felony, it was held that a State may require good character as a qualification for the practice of medicine, and may rightfully determine what shall be evidences of that character.

> "We do not mean to say," the Court observed, "that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. County Seat of Linn County, 15 Kansas, 500, 528. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the Legislature as conclusive evidence thereof. It is not the province of the Courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the Legislature to determine. 'The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity.' Dent vs. West Virginia, *supra*, page 122."

In W. W. Cargill Co. vs. Minnesota, 180 U. S. 452, it was held that the classification of elevators and warehouses on a railroad right of way or depot grounds, and other lands used in connection with the railway at stations and sidings other than at terminal points, as made by Minnesota General Laws, 1895, chapter 148, page 313, requiring a

license for such elevators and warehouses, does not deny to the proprietors the equal protection of the laws, because a license is not required for elevators and warehouses differently situated. The Court, through Harlan, J. (at page 469), said:

> "If in the judgment of the State it was necessary for the public interests or beneficial to the public, that elevators and warehouses of the kind described should be operated only under a license and under such regulations as may be rightfully prescribed, it would be going very far to hold that such a classification was so unreasonable as to justify us in adjudging that the requirement of a license was void, as denying the equal protection of the laws."

See also in the opinion of Judge Pearce the quotation from Magoun vs. Ill. Trust & Savings Bank, 170 U. S. 293-4 (Record, pages 14-15).

See also the opinion of Judge Pearce, at pages 12-15 of the Record in this case.

Cooley, Principles of Constitutional Law (3d Edition), pages 256-257.

The reasons upon which are based the exceptions provided for in the statute under consideration, are so manifest and appropriate that there is no necessity or occasion for argument concerning them.

Scholle vs. State, 90 Md. 729, 741.

State vs. Van Doran, 109 N. C. 864.

## II.

It was argued in the Court of Appeals of Maryland that the indictment was defective, because it did not aver that the Secretary-Treasurer of the Board of Medical

Examiners sent to the plaintiff in error the notice prescribed in Section 80 of Article 43 of the Maryland Code of 1904.

This section reads as follows:

"Each of the said boards shall, at its meeting on the first Tuesday in June of each year, appoint a secretary-treasurer for the board, whose term of office shall last for one year, and who shall be eligible for reappointment and whose duties shall be as follows: Within sixty days from the time of his appointment by his respective board, it shall be the duty of the clerk of the Circuit Court of Baltimore City, and the clerk of the Circuit Court for each county in the State to furnish the secretary-treasurer of each board a list of all physicians who have been legally registered in such Court. To all those physicians who have at that time been practising in the State without having been legally registered, said secretary-treasurer shall send a printed notice of the section of this article relating to the duty of the Police Commissioners in Baltimore city and the sheriffs of the counties of the State under this law. Within four months of the time of his appointment he shall see that all physicians entitled to register have been registered, and that the names of all those who are not entitled to be registered under this sub-title have been presented for prosecution to the State's Attorney of the city of Baltimore, and of each county in the State in which the accused, respectively, reside. Those physicians, who being entitled to register under this sub-title, yet have failed to comply at the expiration of this time—four months from the election of the secretary-treasurer of the board—shall also be prosecuted, and no one after the eleventh day of April, 1902, shall be allowed to practice medicine or surgery without being duly registered according to the provisions of this sub-title. The

secretary-treasurer shall keep the official records of the board for which he is secretary, as provided for in Section 81 of this sub-title, the examination papers of applicants for at least three years, after they have been passed upon by the board, after which they are to be destroyed, and a complete list of all registered physicians in the entire State. He shall call to the attention of the State's Attorneys of Baltimore City and of the different counties throughout the State all violations of the law under this sub-title. He shall collect and hold all moneys belonging to the Board, for which he shall give bond to the State of Maryland in the sum of $1,000, the same to be held by the President of the Board. He shall receive from the income of the Board such salary as his respective Board may determine."

It is manifest, it is submitted, that this section of the Code is merely directory to the Secretary-Treasurer of the several Boards of Medical Examiners to send this notice, and that the receipt of this notice was not intended to be a condition precedent to the obligation of physicians and surgeons to secure registration if they wished to practice medicine.

This is made clear by Section 99 of this same Article of the Code, which reads as follows:

> "Any person who after the first day of July, 1894, shall practise or attempt to practise medicine or surgery in this State, without being registered in accordance with the provisions of this sub-title, shall be guilty of a misdemeanor, and shall be fined not less than ten dollars nor more than two hundred dollars for each offense."

If by any possible construction of the law it could be held that the sending and receipt of the above-mentioned notice was a condition precedent to the liability of a physician or

surgeon to punishment for practising medicine or surgery without being registered, the failure to receive such notice would be a matter of defense which could have been pleaded by the plaintiff in error.

It is well-settled that where an offense is defined in general terms in a statute without any reference to any exception, but an exception is stated in a separate section of the law, the indictment need not negative the exception, but the exception is a matter of defense.

Parker vs. State, 99 Md. 201.
State vs. Knowles, 90 Md. 658.
Kiefer vs. State, 87 Md. 565-568.
Stearns vs. State, 81 Md. 344.

This principle was distinctly laid down in United States vs. Cook, 17 Wallace, 168. In that case this Court said:

> "Where a statute defining an offense contains an exception in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused."

See also—Steel vs. Smith, 1 Barnewall & Alderson, 99.
Archbold's Criminal Pleading, 15th Ed. 54.
Commonwealth vs. Hart, 11 Cushing, 132.

The plaintiff in error sought also to maintain that in consequence of the action of the trial and the appellate courts in overruling this demurrer, he was indicted, tried and convicted without due process of law. This position is also untenable.

Mr. Justice Miller, discussing in his lectures on the Constitution of the United States, the scope and application of the Fourteenth amendment, says:

> "It was not designed to interfere with the power of a State to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudications of the Courts of the State in administering the process provided by its laws. Therefore, when a person accused of crime within a State is subjected, like all other persons in the State, to the law in its regular course of administration in Courts of justice, the judgment so arrived at cannot be held to be an unrestrained and arbitrary exercise of power, and therefore void."

And Mr. Justice Field, in the case of Missouri Pacific R. Co. vs. Humes, 115 U. S. 512, said:

> "In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of 'law of the land.' And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty and the arbitrary spoliation of property. But, from the number of instances in which these words are invoked to set aside the legisla-

tion of the States, there is abundant evidence, as observed by Mr. Justice Miller in the case referred to, 'that there exists some strange misconception of the scope of this provision, as found in the XIVth Amendment.' It seems, as he states, to be looked upon 'as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a State Court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.' This language was used in 1877, and now, after the lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of the provision.

"If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

The case at bar involves no conceivable deprivation of any of those primary rights which are secured to the individual by the "law of the land." It is, of course, too obvious for discussion that by the most elementary principles of our jurisprudence the plaintiff in error, was bound without previous notification, to know what was required of him by the law. Furthermore he was duly advertised and apprised by the indictment of the charge preferred against him. With respect to the subsequent proceedings in the case, the record leaves nothing pertaining to this inquiry in doubt. It clearly appears that he had sufficient time before trial to prepare himself for his defense; that if he then had

any special defense, including that concerning notice, he had ample opportunity to present, and could, by special plea, have availed himself of such defense; that upon trial he was by a jury duly convicted of the offense charged, and sentenced by the Court to pay a fine of $200 and costs; and that an appeal having been taken, this judgment was after thorough consideration affirmed by the Appellate Court of the State. Manifestly, there is not the slightest indication of a disregard of any of those "fundamental principles" or "general rules which our system of jurisprudence prescribes for the security of private rights," or of any "arbitrary deprivation of life, liberty or property." There is no fact in this case to sustain this contention of the plaintiff in error.

III.

After the demurrer to the indictment had been overruled, the plaintiff in error filed on January 28, 1907, a special plea. This plea set forth an indictment of the plaintiff in error, found at the January Term, 1906, of the Circuit Court for Allegany County, for unlawfully practising medicine in the year 1905, without being then and there duly registered.

After setting out this previous indictment, this plea concluded thus:

> "That he pleaded not guilty to said indictment and was thereupon by the verdict of a jury duly empaneled and sworn to try said indictment, found not guilty of the matter whereof he stood thus indicted, whereupon he was by said Court duly discharged.
>
> "That he and the said John A. Watson, defendant, in the above recited indictment, are one and the same person, and the offense therein set out and that now charged are one and the same offense. And that at said trial *the only question* was whether the defendant could

lawfully practise medicine in Allegany county without being registered as a physician or surgeon in the registry of Physicians and Surgeons under Article 43 of the Code, sub-title 'Practitioners of Medicine.'"

To this plea the State of Maryland demurred, and the Court sustained the demurrer.

Then leave of Court being first had, the plaintiff in error filed a second amended plea.

This plea, after again setting out the same indictment as was set out in the first special plea, concluded as follows:

"That he pleaded not guilty to said indictment, and was thereupon by the verdict of a jury duly empaneled and sworn to try said indictment, found not guilty of the matter whereof he stood thus indicted, whereupon he was by said Court duly discharged.

"That he, the said John A. Watson, defendant in the above-recited indictment, are one and the same person; and the offense therein set out and that now charged are one and the same offense. Defendant says that at said trial *it was proved without denial* that he, the said defendant, practiced medicine in Allegany County, at the time alleged in said indictment, and that at said trial the only question at issue was whether defendant was entitled and qualified (under Article 43 of the Code, sub-titled 'Practice of Medicine') to practice medicine in Allegany County, and that by the verdict and judgment in said case it was adjudged that defendant was so entitled and qualified, and defendant says that the qualification to practice medicine in said county under said law is now and was, since said trial has been, identical, the same it was at the time of said indictment and trial and at the time of the alleged unlawful acts set forth in said indictment."

To this second plea the State likewise demurred and this demurrer was also sustained.

It will be noted that the time stated in the indictment set forth in each of these pleas, when the offence is alleged to have been committed is prior to the time alleged for the commission of the offence charged in the indictment in the case at bar and that the pleas and indictments in fact show that the two indictments were not for the same offense.

Neither of the pleas, therefore, could be held good as a plea of *Autrefois Acquit.*

People vs. Gault, 104 Mich. 575.
Freeman vs. State, 119 Ind. 501.
Hite vs. State, 9 Yerger, 357.
Gormly vs. State, 37 Ohio, 120.
Worthan vs. Commonwealth, 5 Rand (Va.), 669.
9 Ency. of Plead. & Pract., page 640, note 3.
17 Amer. Eng. Ency. of Law (2d Ed), 596, 597, 604 and note 4.

That the two indictments charged separate and distinct offenses is shown by the fact that evidence which would have supported a conviction under one of them would have been inadmissible under the other.

1 Bishop's New Criminal Law, Section 1052, sub-section 2.
17 Amer. & Eng. Ency. of Law (2d Ed.), 597.

The pleas, however, seem to have been framed on the theory that the legal effect of the acquittal of the plaintiff in error, at the trial under the indictment of the January term, 1906, worked an estoppel on the State, which prevented it from ever thereafter alleging that the plaintiff in error was required to register as a condition of being permitted to lawfully practise medicine.

It would seem on principle that the State, being a sovereign, could not be estopped as an individual or corporation might be.

Alexander vs. State, 56 Ga. 478-486.
People vs. Brown, 67 Ill. 435, 438.
Farish vs. Coon, 40 Cal. 35, 50, 51.
State vs. Graham, 43 La. Annual, 402, 403.
Crane vs. Reeder, 25 Mich. 303, 320, 321.
St. Louis Refrigerator Co. vs. Lungley, 66 Ark. 48.
State vs. Bevers, 86 N. C. 588, 592.
State vs. Williams, 94 N. C. 891.

This last case is identical in principle with the case at bar on the point we are considering. Williams was indicted for selling liquor within five miles of a church and was acquitted. This acquittal, it was held, did not estop the State from proving in another trial, on another indictment, for another sale of liquor, at the same place, that the place was less than five miles from the church.

Judge Ashe, in delivering the opinion of the Court (94 N. C. 895), said:

"The defendant, if we understand his position, contended that inasmuch as in the former indictment against him, the jury found that the 'Jim Green Place' was not within five miles of Bethel Church, the State was estopped thereby from so insisting in this indictment, against the same person, for selling liquor at the same place although the charge in this indictment was for selling to a different person. There might possibly be some force in the position, if the State was subject to the law of estoppel. But, unfortunately for the contention of counsel, it has been held in this State that the doctrine of estoppel does not apply to the sovereign."

Wallace vs. Maxwell, 10 Ired. 110.
Taylor vs. Shuford, 4 Hawks, 132.
Candler vs. Lunsford, 4 D. & B. 407."

And to the same effect is the statement of the law in Justice vs. Commonwealth, 81 Va. 217, where the Court said :

> "But the doctrine of estoppel, strictly speaking, is not applicable to the Commonwealth in a criminal prosecution. The nearest approach to it is the doctrine formed on the maxim of 'the common law, that no one shall twice be put in jeopardy for this offense. 'This doctrine,' says Bigelow, 'has a close relation to the estoppel by former judgment, and may be considered as the criminal law counterpart of the same doctrine. But the doctrine rests upon technical notions of jeopardy and not upon the principle *res judicata*,' etc.
>
> Bigelow on Estoppel (3d Ed. 47)."

High public policy requires that this salutary rule of law should be maintained. It would be most detrimental to the public interests if the fact that, owing to the ignorance, the caprice, the corruption, or the honest mistake of judgment as to the law, or the facts, of a petit jury in a criminal case, any individual who had been tried and acquitted of a specific violation of the law, could become thereby immune from punishment for all subsequent violations of it.

And all the analogies in the law are against there being an estoppel against the State.

Laches do not run against the State.

> U. S. vs. Tusley, 130 U. S. 263.
> Booth vs. U. S., 11 G. & J., 373.

That the State's governmental power and duty to enforce public order and preserve public health cannot be abdicated

or bartered and contracted away, or hindered or affected by the principle of estoppel, is shown by many decisions.

Stone vs. Mississippi, 101 U. S. 814.
Beer Company vs. Massachusets, 97 U. S. 24.
Lake Roland Elev. R. R. vs. Baltimore, 77 Md. 381.
Toll Road vs. People, 37 L. R. A. 711, 721.
Portland Hibernian Society vs. Kelly, 30 L. R. A. 167, 176.
Railroad vs. Dennis, 116 U. S. 665.

Set-off cannot be pleaded against the sovereign (State vs. B. & O., 34 Md. 345), and, of course, limitations do not run against it.

In 2 Hale's Pleas of the Crown, m. p., 241, in naming the sorts of pleas in bar of the indictment, the learned author mentions *Autrefois Acquit, Autrefois Convict, Autrefois Attaint,* and *Autrefois Convict* of another felony, and had his clergy; but there is no mention of the plea of estoppel.

See also 4 Blackstone's Com., mar. page 335.

An acquittal on an indictment for knowingly cutting timber belonging to the United States does not prevent the United States from maintaining a civil suit for cutting the same timber.

Stone vs. United States, 167 U. S. 178.

Without stopping, however, to further consider whether the State, by the verdict of a jury, could ever be estopped from claiming that in the future the plaintiff in error should be compelled to obey this most wise and useful medical registration law, it is submitted that neither of the pleas properly raised the question.

A plea of estoppel not being a plea to the merits must in criminal cases be pleaded with *very great certainty and precision.*

1 Bishop's New Criminal Procedure, Sections 323-324.

"A judgment is not *res judicata* as to a question not appearing upon the face of the record, or shown by extrinsic evidence to have been determined in the action. If there be any uncertainty as to the precise issue involved and determined in the action, as for example, if it appear that several distinct matters were litigated, upon any one or more of which the judgment may have turned, the whole matter of the action will be at large and open to controversy."

24 Amer. & Eng. Ency. of Law (2d Ed.), 773, 774, 775.

Or, as was said by the late Mr. Justice Brewer, in delivering the opinion of the Supreme Court, in DeSollar vs. Hanscome, 158 U. S. 221:

"Now, it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former action."

Neither a judgment *in rem.* nor a judgment *inter partes*, is evidence of any matter which can be *inferred only by argument* from the judgment.

Russell vs. Place, 94 U. S. 608.
Hughes vs. United States, 4 Wallace, 237.
Watts vs. Watts, 160 Mass. 464.
Van Valkenburg vs. Milwaukee, 43 Wis. 574.
Singerly vs. Attorney General, 2 H. & J. 411.
Johnson vs. Stockham, 89 Md. 379.
Emmert vs. Stouffer, 64 Md. 552.

An apt illustration of the limitations on the effect of a judgment as an estoppel as to the facts passed on, is furnished by the case of Bell vs. State, 57 Md. 108. In that case, Bell had been acquitted of uttering a certain forged check, and yet when on trial for uttering another forged

check, the State's Attorney was permitted to prove that he uttered this first check and that it was forged.

Said Judge Grason (57 Md. 116-117):

"An acquittal of the party does not ascertain or determine any precise facts. It may have resulted from an insufficiency of evidence as to some particular fact, where several facts are necessary ingredients of the crime. 2 Cowen's Phil. Ev. 55, 56; Roscoe's Cr. Ev. 194.

"Such an acquittal upon an indictment for uttering a forged check would not necessarily negative the fact that the check was forged, if, in fact, it was forged; nor the possession by the party of the forged paper, for the uttering of which he was indicted; nor that he uttered the forged paper for value. All these facts may have been found to be true, and yet the party may have been acquitted, because of the absence of proof of such facts and circumstances as were necessary to show that the accused uttered the forged paper with intent to defraud. The verdict of acquittal may have resulted from the fact that the jury could not, upon the evidence before them, find *all* the facts, which must exist and be proved, in order to constitute the crime of having forged or uttered forged paper. The ground of such an acquittal can only be inferred by argument upon the judgment of acquittal. (2 Taylor's Ev., section 1520). In such a case the principle of estoppel is not applicable, because it does not appear that the genuineness of the check of July 17, for forging and uttering which the accused had been acquitted, or his possession of such check, or his having parted with it for value, had been distinctly put in issue and passed upon by the jury in that case. Cecil vs. Cecil, 19 Md. 78, 79; Whitehurst vs. Rogers, 38 Md. 512."

So here, the plaintiff in error may have been acquitted so far as the record shows, either because the jury believed he was registered in 1905, when he was accused of practicing medicine without a license, or because the jury did not believe that he had practiced medicine at the time alleged in the indictment which was set out in the special pleas.

Neither of the special pleas state with the requisite certainty that the plaintiff in error submitted necessarily, and distinctly, to the jury that acquitted him when tried under the indictment of January, 1906, the question of his right to practice medicine.

He does not state that he filed any special plea in the case, *admitting* that he had practiced medicine at the time stated in the indictment. He states, in the first of these pleas, that the offense charged in indictment under which he was convicted, and that charged in indictment at bar "are one and the same offense." An inspection of the two indictments shows that this statement is not correct. He further avers that at said trial the only question was whether the defendant could lawfully practice medicine in Allegany county without being registered as a physician or surgeon in the registry of Physicians and Surgeons under Article 43 of the Code, sub-title "Practitioners of Medicine." What was the issue in the case was a matter of judgment. The plaintiff in error should have stated the *facts*, and then the Court could tell whether his right to practice without registry was or was not the only issue in the case.

And so, in the second plea, the plaintiff in error is likewise wanting in that certainty called for in a plea not to the merits. There, where he wishes to show that the issue decided was whether he had the right to practice medicine without registering, he contents himself with saying that at the former trial "*it was proved without denial* that he, the said defendant, practiced medicine in Allegany County at the

time alleged in said indictment, and that at said trial the only question at issue was whether the defendant was entitled and qualified (under Article 43 of the Code, sub-titled Practice of Medicine) to practice medicine in Allegany County, and that by the verdict and judgment in said case it was adjudged that defendant was so entitled and qualified and defendant says that the qualification to practice medicine in said county under said law is now, and was, since said trial has been identical the same it was at the time of said indictment and trial and at the time of the alleged unlawful acts set forth in said indictment."

*Non constat* that the jury *believed* the plaintiff in error had practised medicine even if the proof to that effect was not denied. The remainder of the plea is largely matter of judgment and of inference and is not very intelligible. It most assuredly does not make it *certain* that the jury in the former case passed on his right to practise medicine without registering.

For these reasons it is respectfully submitted that the judgment should be affirmed.

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